IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W.P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF ON THE MERITS

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September 3, 1976

Dunbar Printing Co., Dunbar, W. Va.

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In this Brief on the Merits, Columbia Gas Transmission Corporation, Appellee (including its predecessor, United Fuel Gas Company) will be referred to as "Columbia" and the Appellee, W. P. Dodd (a defendant below and the purchaser of Pearson's title at the tax-sale) will be referred to as "Dodd". Appellant, Cecle G. Pearson (the plaintiff below) will be referred to as "Pearson".

OPINIONS BELOW

The opinion below by Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion below is set out in full in Appendix A, appended to Appellant's Jurisdictional Statement.

The judgment of June 19, 1972, by the Circuit Court of Kanawha County, West Virginia, incorporating the Court's memorandum of opinion of April 17, 1972, is set out in full in Appendix B, appended to Appellant's Jurisdictional Statement.

JURISDICTION

The suit involved in this appeal was brought by Pearson to set aside, as a cloud upon her alleged title to an oil and gas interest, a conveyance of such interest by a tax deed made pursuant to a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1257(2), or, in the alternative, §1257(3). This Court noted probable jurisdiction on June 21, 1976.

STATUTES INVOLVED

The case involves the validity of West Virginia Code §§11A-4-12 and 11A-3-8. These statutes are set out in Appendix C, appended to Appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

The questions presented for review are:

I. Do the due process requirements of the Fourteenth Amendment to the United States Constitution invalidate a West Virginia statute which permits a tax sale of real property, owned by the State, upon publication naming the former owner as a defendant and also naming, as defendants, unknown parties claiming under the former owner?

II. Do the provisions of West Virginia Code §11A-3-8 vesting title in the State to tax delinquent property, not timely redeemed, render moot any question of the adequacy of notice by publication only to the prior owner at the subsequent sale of the State's title?

III. Independent of the other questions, will due process objections justify the retroactive invalidation of innumerable long established land titles?

STATEMENT OF THE CASE

By a deed executed and recorded in 1937, Pearson acquired a one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia (App. 63-64). Although Pearson did not cause a change of the entry in the Land Books (the official assessment rolls for real property in West Virginia) from the former owner's name to her own, Pearson's husband paid the real estate taxes on her interest from 1938 until 1960 (App. 41). No taxes were paid on Pearson's interest in 1961. As a result of this nonpayment, in 1962 the property embraced by the assessment of Pearson's interest (an oil and gas interest) was declared delinquent and was sold to the State of West Virginia pursuant to statute (App. 53-54, 72).

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County (the statutory officer of the State charged with the duty of selling delinquent and irredeemable real estate) instituted a statutory suit in the name of the State for the sale of this real property interest (App. 65-76). On June 1, 1966, in keeping with orders entered in the suit (App. 73-80, 83-88, 97-101), the Deputy Commissioner conveyed by a tax deed to Dodd (the purchaser at the Deputy Commissioner's sale), the property assessed in the name of H. C. Pearson, Jr. (App. 102). In 1967, Dodd and his wife ratified an existing lease (App. 103-105) upon the sixty-eight acres held by United Fuel Gas Company, and granted United the right to drill a natural gas well (App. 106-107). This well was completed in 1968 at a cost of $104,500.87 and produced an initial

open flow of one hundred million cubic feet of gas (App. 117-120). Columbia is the successor in interest to United (App. 49).

On July 26, 1968, Pearson paid the State Auditor $101.86 and received what was designated a Certificate of Redemption of Lands in her name for the property in question (App. 121). However, at that time, the property was irredeemable under Code §11A-3-8 and the attempted redemption was, within the statutory intention, of no effect. Pearson subsequently filed this suit against the Dodds and United (now Columbia).

West Virginia Code §11A-4-12 permits the sale of delinquent property interests previously sold to the State and irredeemable (the situation involved in this case) upon notice by publication upon "unknown parties who are or may be interested in any of the lands included . . . ." A statutorily sufficient notice of the sale in question was given by publication.

Upholding the statutory scheme for tax sales and affirming that this particular sale was in keeping therewith and in keeping with due process requirements, the Circuit Court granted judgment for the Dodds and Columbia. In its letter memorandum of opinion, it held, *inter alia,* that the notice provisions of §11A-4-12 did not deny Pearson due process of law under the State Constitution or the United States Constitution. The Supreme Court of Appeals of West Virginia affirmed the judgment of the Circuit Court against the former owner, Pearson.

SUMMARY OF ARGUMENT

Eighty years ago, *King v. Mullins,* 171 U.S. 404 (1898), held that the notice by publication provisions under the West Virginia statutory scheme for collecting real property taxes did not violate due process under the Fourteenth Amendment. Insofar as the due process question is concerned, the statutory tax collection provisions remain essentially the same.

Procedures for collecting real property taxes do not require the same kind of notice or process required in a suit at law.

Other decisions by this Court affecting Illinois, Pennsylvania, Kentucky, Nebraska and Arkansas have held likewise, substantiating no violation of due process under the Fourteenth Amendment in State notice by publication provisions under procedures for collecting real property taxes.

The State's need to collect revenue requires that an owner either pay real property taxes or lose his title to another who will pay the taxes.

A property owner who does not pay his taxes is presumed to know that the property will be sold to allow collection if the delinquency continues. In this regard, the owner of property is a caretaker who has a duty to watch published legal notices affecting his property.

The principles in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), do not apply in cases such as this where the names and addresses of affected parties are not at hand. However, *Mullane* does not require an impracticable and expensive title search to determine the identity of interested parties in a prospective tax deed situtation.

Decisions following the principles in *Mullane* in condemnation and other appropriation cases can be distinguished from cases where real property taxes are being collected.

This appeal does not involve a windfall to one party at the expense of another party.

West Virginia Code §11A-3-8 vesting title in the State to tax delinquent property, not timely redeemed, renders moot any question of the adequacy of notice by publication only to the prior owner at the subsequent sale of the State's title.

An independent State ground on which the decision below is based will bar attacks in this Appeal, under the doctrine of *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

West Virginia Code §11A-3-8 is such independent State ground barring this Appeal.

By virtue of West Virginia Code §11A-3-8, Pearson had no significant property interest in 1966 to question the adequacy of notice by publication at the State's sale of its title.

The decisions in other state courts are not probative or determinative on the issue of due process under the Fourteenth Amendment. The decision by the highest Court in the State of West Virginia has held that due process is not denied by procedures for collecting real property taxes.

Independent of the other questions, due process objections do not justify the retroactive invalidation of innumerable long established land titles.

The desired stability of land titles requires that tax-deeds should not be upset.

Tax-deeds, like securities or municipal bonds, should not be upset in arrears but only prospectively, if at all.

ARGUMENT

I. WEST VIRGINIA CODE §11A-4-12 PERMITTING A TAX SALE OF REAL PROPERTY, OWNED BY THE STATE, UPON PUBLICATION NAMING THE FORMER OWNER AS A DEFENDANT AND ALSO NAMING UNKNOWN PARTIES CLAIMING UNDER HIM AS DEFENDANTS, DOES NOT DENY DUE PROCESS OF LAW.

Almost eighty years ago this Court directed its attention to the question once again before this Court on appeal by Pearson. In *King v. Mullins,* 171 U.S. 404 (1898), the very question now before this Court was whether the system of taxation in the State of West Virginia, and its provisions for forfeitures, were repugnant to the Fourteenth Amendment of the Constitution of the United States. In holding that the system established by the State of West Virginia is

not inconsistent with the due process of law required by the Constitution of the United States, this Court said:

> "The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

The principles governing the situation in this appeal by Pearson are more recently and succinctly endorsed in a case styled *Balthazar v. Mari Ltd.,* 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd* 396 U.S. 114 (1969), wherein the Court below said:

> "Relying upon Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property. See, *e.g.,* United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943); City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930); Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923); Chicago Burlington and Quincy R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."

Once again, the Court cited with approval the definitive and determinative decision of *King v. Mullins, supra.*

To some considerable extent, the decision in *King* was founded upon the earlier decision of this Court in *Bell's Gap Railroad v. Pennsylvania,* 134 U.S. 232, 239 (1890), wherein this Court declared:

> " 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the

power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages * * * .'"

In the *Balthazar* holding, affirmed by this Court, the Court below cited with approval as late as 1969 the holding of this Court in the *Bell's Gap Railroad* case, *supra.*

In *King v. West Virginia,* 216 U.S. 92 (1910), which was a companion case to *King v. Mullins, supra,* once again the former owner raised the spectre of an alleged denial of due process under the Fourteenth Amendment. Because of the previous holding by this court in *King v. Mullins,* in *King v. West Virginia* this Court said then (and the expression is apt to this appeal): "The question is not open and we shall discuss it no more." Columbia submits that as long ago as 1898 it was determined that the system for perfecting tax deeds in West Virginia does not violate the due process provisions of the Fourteenth Amendment.

In *Kentucky Union Co. v. Kentucky,* 219 U.S. 140 (1911), as against a claim of denial of due process under the Fourteenth Admendment to the Constitution, this Court upheld the Kentucky Act of 1906 Relating to Revenue and Taxation. As recited in the opinion, the Kentucky Act permitted a proceeding by publication "in the name of the Commonwealth of Kentucky, as plaintiff, against the said tract of land and the owners or claimants of said land, as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as unknown owners and claimants thereof". Columbia submits that Pearson was proceeded against here by publication as an unknown defendant because she was an unknown defendant, and that she was not denied due process within the holding of the *Kentucky Union* case.

In *Leigh v. Green,* 193 U.S. 79, 90 (1903), the Nebraska statute involved clearly authorized a foreclosure to satisfy a tax lien without actual service against all lienholders within the jurisdiction of the Court. In upholding the statutory provisions for process by publication, the Court observed:

"Nor is the remedy given in derogation of individual rights, as long recognized in proceeding *in rem,* when the 14th Amendment was adopted. The statute undertakes to proceed *in rem,* by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in Cooley on Taxation, 2d ed. 527: 'Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form.'"

In *Ballard v. Hunter,* 204 U.S. 241, 262 (1907), in upholding an Arkansas statute, which permitted other than personal service, against the onslaught of alleged violation of due process of the Fourteenth Amendment, this Court said:

"It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceed-

ings; indeed, must frame them, and assume the care of property to be universal; if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U.S. 559, 32 L.ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

As observed in the decision in this case by the Supreme Court of Appeals of West Virginia, under Code §11A-3-8 if redemption by the owner does not occur within eighteen months of the date that the tax delinquent property is sold to the State of West Virginia, then absolute title vests in the State of West Virginia. The interest of Pearson was sold to the State in 1962. The publication of which Pearson complains occurred in 1966 at a time when the State, in effect, was auctioning off land which it owned because of the previous delinquent tax procedure.

Decisions of the Supreme Court of Appeals of West Virginia have consistently held that the former owner has no right to be a party to the proceedings for the sale of land previously sold to the State of West Virginia for delinquent taxes. *State v. Simmons,* 135 W.Va. 196, 64 S.E. 2d 503 (1951); *State v. Gray,* 132 W. Va. 472, 52 S.E. 2d 759 (1949); *State v. Blevins,* 131 W.Va. 350, 48 S.E. 2d 174 (1948); *McClure v. Maitland,* 24 W. Va. 561 (1884).

Pearson cites the authority of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), to the following effect:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reason disappears for resort to means less likey than the mails to apprise them of its pendency." (At page 318 of 339 U.S.)

In the factual situation in this case involving Pearson, the notice complained of occurred in 1966. The record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson. Indeed, in her statement of the case, Pearson concedes that in spite of the deed to her from H.C. Pearson, Jr. in 1937, the Appellant did not have corrected the entry in the Land Books from the former owner's name to her own.

The plain import of Pearson's position is that a valid tax sale in 1966 required the State to pursue a record title search for a period of thirty years going back to 1937, to find Pearson's name and claimed interest, and then to pursue some further inquiry as to her address, despite the imposssibility or impracticability of such an endeavor by reason of the passage of almost thirty years.

While the State is not concerned with who specifically pays the taxes, if the taxes are not paid, the State's requirements for revenue dictate the need of a tax-sale to place the asset in the hands of an owner who will pay the taxes. In this regard, the declarations of legislative purposes and policy are clear. See Code §11A-3-1 and Code §11A-4-1.

In West Virginia, there is no requirement of or procedure for determining the address of the taxpayer. The rationale underlying the lack of any such procedure is particularly evident with reference to severed mineral interests, such as here involved. Hidden assets of this nature cannot be likened to improvements on the surface, such as residences, where the whereabouts of parties in interest may be apparent or easy of determination, and where seizure for

delinquent taxes would be notice of the lien, delinquency and impending disposal to satisfy the taxes.

In Pearson's case, while the interest was owned by Pearson, it remained assessed in the name of her son (who had conveyed it to Pearson) for almost a quarter of a century. For years, the tax tickets were in fact secured and paid by Pearson or her husband (App. 40-42). Pearson's husband was an experienced businessman (App. 39) who, at one time, owned interests in fifty to seventy tracts of land (App. 40). Not only had Pearson or her husband paid the tax ticket for many years, the effect—loss of title—of not paying the tax ticket was clearly known to them (App. 41-42).

In distinguishing the principles of *Mullane* from the facts in *Pearson* (the present case), it is apparent that an attempt to comply with *Mullane* in a prospective tax-deed situation would involve not just the relatively minor costs of, say, mailing the notices to the interested parties. Applying *Mullane* to a prospective tax-deed situation would involve the impracticable, frequently impossible and unquestionably considerable expense of first determining the identity of the interested parties. In this case, the interest of Pearson would have been revealed in 1966 only by an examination of records covering a period back to 1937—a 30 year title search. In West Virginia, to determine the ownership of gas, oil and mineral interests, such as here involved, a title examiner could not stop short of the year 1850, the beginning of the era of severances generally of surface and mineral titles. *See Freudenberger Oil Co. v. Simmons,* 75 W. Va. 337, 83 S.E. 995 (1914) and *United Fuel Gas Co. v. Dyer,* 185 F.2d 99 (1950). An application of the principles of *Mullane* in prospective tax-deed situations would require searching the records back 125 years! Ultimately, such search would, if fruitful, disclose merely the names of parties in interest. One is left to imagine the impossible effort and prohibitive expense required in attempting to determine the addresses of the interested parties whose names were disclosed by such title search.

Pearson's contention for direct notice within *Mullane* is best answered by the authority of *City of New Rochelle v. Echo Bay Waterfront Corp.,* 49 N.Y.S.2d 673, 268 App. Div. 182, *aff'd* 60 N.E.2d 838, 294 N.Y. 678, *cert. denied,* 326 U.S. 720 (1945), to the following effect:

> "It is settled law, however, that indirect notice is sufficient to persons interested in real property which is in default in payment of taxes. 'The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603 32 L.Ed. 1045. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service.' Ballard v. Hunter, 204 U.S. 241, 254, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461."

Pearson cites the authority of *Walker v. City of Hutchinson,* 352 U.S. 112 (1956), in which this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on official records, was insufficient notice to meet the requirements of due process. Here there is not the slightest indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson at the time of such publication.

With reference to *Walker, supra,* which was a condemnation case, beyond peradventure the landowner who complained of inadequate notice was truly the owner. In the facts involved in this appeal by Pearson, in view of the provisions of Code §11A-3-8, after the passage of eighteen months from the sale of Appellant's land in 1962 to the State of West Virginia, the owner in 1966 was not Pearson but rather the State of West Virginia.

The case of *Schroeder v. City of New York,* 371 U.S.

208 (1962), cited by Pearson, must be distinguished from the present appeal. Once again, the *Schroeder* case was a condemnation action wherein the Appellant was admittedly the true owner. Moreover, the record in that case reflected that both the name and address of the Appellant were readily ascertainable. Furthermore, analysis of this decision indicates that the condemning authority did not comply with the requirements for posting, as specified in the enabling legislation, which omission alone violated the requirements of statute. In the present case, the tax delinquency proceedings were in exact compliance with the statutes.

The case of *Covey v. Town of Somers,* 351 U.S. 141 (1956), also relied on by Pearson, involved the foreclosure of tax liens on real property where the conceded owner of the property (proceeded against by mailing, posting and publication) was an incompetent without the benefit and protection of a guardian. In contrast, in this case Pearson concedes that she knowingly did not fulfill her responsibility in changing the entry on the Land Books from the name of the former owner to her own. Moreover, after paying the taxes for the years 1938 through 1960, Pearson concedes that she omitted to pay taxes assessed for 1961. Under such facts, Pearson can hardly equate her position with that of the incompetent in the *Covey* case.

The case of *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1966), involved a garnishment procedure in Wisconsin, held violative of due process because the defendant was deprived of the "use" of the garnished portion of her wages during the interim between the garnishment and culmination of the main suit. However, even *Sniadach* conceded distinguishable situations where such summary procedure may well meet the requirements of due process in extraordinary situations. Special protection to a State interest was observed as a distinguishable fact not present in *Sniadach* (395 U.S. 337, 339). A viable State interest is certainly extant in this present case.

As pointed out in the dissent in *Sniadach,* if a procedure has prevailed for many years by common consent, it should require a strong case for the Fourteenth Amendment to affect it (395 U.S. 337, 349). The procedure for collection of real property taxes in West Virginia finds its aegis in its Constitution of 1872 and upheld by this Court in *King v. Mullins,* 171 U.S. 404 (1898). Literally thousands of land titles are founded upon the procedures long followed in West Virginia.

Fuentes v. Shevin, 407 U.S. 67 (1972), held violative of due process Florida and Pennsylvania replevin statutes insofar as they denied the right to a prior opportunity to be heard before chattels were taken from their possessor. Once again, *Fuentes* conceded and distinguished situations allowing seizure of property necessary to secure an important government function or general public interest (407 U.S. 67, 90-91). Columbia submits that the collection of taxes is such an important governmental function and general public interest.

Robinson v. Hanrahan, 409 U.S. 38 (1972), held that notice of forfeiture of an automobile violated due process since the notice mailed by the State to the owner at his home address was not "reasonably calculated" to apprise the owner of the proceedings, when the State was holding the owner in jail. Such objectionable procedure can hardly be equated with the facts in *Pearson.*

This Court is not faced with a claim of a denial of equal protection within the intent of the Fourteenth Amendment. However, even in a case involving such a contention, this Court has recently deferred to a state tax law reasonably designed to further a state policy. *Kahn v. Shevin,* 416 U.S. 351, 355 (1974). In that case, this Court again cited with approval *Bell's Gap Railroad v. Pennsylvania, supra.* The Court will recall that *Bell's Gap* was the case which preceded and, to some considerable extent, formed the bases on which *King v. Mullins, supra,* was founded. To reiterate, it was *King,* almost eighty years ago, which held

that the system of taxation in the State of West Virginia, and its provisions for forfeitures, were not repugnant to the protection of the Fourteenth Amendment.

Implicit in Pearson's complaint (and sometimes suggested by the commentators on *Mullane*) is the possibility of a windfall in the tax-deed purchaser. In proper perspective, there is no "windfall" involved in this case. For the year 1961, Pearson valued the asset so highly that she discontinued paying taxes in the amount of 77¢ per half. In 1966, Pearson valued the asset so highly that she did not pay $42.58 (App. 92) to redeem it during the pendency of the suit by the Deputy Commissioner of Forfeited and Delinquent Lands.

In short, but for the improvements by Columbia in drilling the well for the sum of $104,500.87 and the value of the gas produced since March 26, 1968, the asset would not now be worth the time and effort of Pearson.

In 1968, only after the investment of $104,500.87 by Columbia in improving the property, did Pearson attempt a redemption from the State Auditor for the sum of $101.86 (App. 121). It is apparent that any asserted "windfall" will not be at the expense of Pearson but—rather—at the expense of Columbia.

The Supreme Court of Appeals of West Virginia in its decision against Pearson went to the heart of the matter when it held:

> "We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests, —often recognized in prior decisions and tenaciously maintained in statements of legislative policy—, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process." (App. at 23A Jurisdictional Statement).

Under the authority of *King v. Mullins, supra,* decided by this Court almost eighty years ago and never overruled, innumerable land titles in the State of West Virginia are founded upon the proposition that statutory tax delinquency procedures in West Virginia do not deny due process of the Fourteenth Amendment to the Constitution. Columbia respectfully submits that this Court should affirm that principle; indeed any other holding would wreak havoc in the State of West Virginia.

Since the authorities support Columbia's position that the notice by publication involved in West Virginia's tax delinquency statutes does not deny due process of law, this appeal does not require consideration of whether a statute of limitation (which Pearson characterizes Code §11A-3-8) might bar Pearson from contesting the validity of the tax sale. Nevertheless, Columbia will respond, *arguendo,* to Pearson's last Point.

II. WEST VIRGINIA CODE §11A-3-8 VESTING TITLE IN THE STATE TO TAX DELINQUENT PROPERTY, NOT TIMELY REDEEMED, RENDERS MOOT ANY QUESTION OF THE ADEQUACY OF NOTICE BY PUBLICATION ONLY TO THE PRIOR OWNER AT THE SUBSEQUENT SALE OF THE STATE'S TITLE.

In a maze of facts and allegations, some pertinent facts have been obscured. In West Virginia, real property taxes are a lien on the property for all taxes, interest and charges as of each July 1st of the year for which they are assessed. Code §11A-1-2. The taxes involved in the present Pearson case were for the year 1961. Taxes are payable in two installments, the first half on September 1st (delinquent October 1st) and the second half payable the following March 1st (delinquent April 1st). Code §11A-1-3. No taxes were paid on Pearson's interest for 1961 taxes or subsequently. Delinquent lists are posted at the Courthouse and published pursuant to Code §11A-2-13. This is not the publication of which Pearson complains. Of course, at this stage, the affected owner has a right to redeem.

Pursuant to Code §11A-2-14, on or before June 15th of the next year, the Sheriff presents the delinquent lists to the County Court for examination. If that Court is satisfied that the lists are correct, the Clerk of the Court certifies a copy of the list to the State Auditor not later than July 1st.

On or before September 10th, the Sheriff prepares a second list of delinquent lands, together with a Notice of Sale, and publishes the same pursuant to Code §11A-3-2. Once again, the owner has an opportunity to redeem. Beyond question the interest of Pearson was delinquent and proceeded against as provided by statute (App. 52-53, 72).

However, if the land or interest therein is not redeemed, between October 15th and November 23rd, the Sheriff sells the item at public auction pursuant to Code §11A-3-4. At the Sheriff's sale, the delinquent item can be bid in by any interested party, which successful bid (after sundry steps and passage of time) culminates in a tax-deed from the County Clerk to the successful bidder. Code §11A-3-15, 20, 21, 23, 24 and 25. It is not a County Clerk's tax deed which is involved in the *Pearson* case.

At the Sheriff's sale, if no person present bids the amount of taxes, interest and charges due, the delinquent land is purchased by the Sheriff on behalf of the State of West Virginia for the amounts so due. Code §11A-3-6. This is what occurred in 1962 as to Pearson's mineral interest; the State did not undertake to divest its interest until 1966. The State's title was pursuant to Code §11A-3-7 by which title vested in the State in 1962, subject to a right of redemption in the former owner from the State Auditor in the 18 months next ensuing.

Moreover, Code §11A-3-8 contains the language and details the effect of which Pearson complains:

> "The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution."

Pearson made no effort in the 18 month period to redeem her interest.

In Pearson's Brief on the Merits (p. 9), Appellant cites *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973), observing that this appeal presents the Court with the precise issue found not to be present in *Paschall.*

Columbia concurs in Pearson's observation of the pertinency of *Paschall.* However, *Paschall,* and the authority therein cited, have a more telling effect in this appeal than merely defining an undecided issue which should be decided. A comparison of *Paschall* with the present appeal by *Pearson* is both necessary and determinative. The rule of *Paschall* requires the dismissal of this appeal.

In *Paschall,* the former owner of real estate brought a suit to quiet title as against the purchaser at a tax sale. The trial of the case involved issues of due process and a statute of limitations, and the trial court upheld the Oklahoma statutes on both issues. On the issue of due process, the Oklahoma Court of Appeals reversed the trial court. However, the Supreme Court of Oklahoma overruled the Court of Appeals on the issue of due process. Upon appeal to the United States Supreme Court, this Court, observing that it had probable jurisdiction on the authority of *Mullane v. Central Hanover Bank & Trust Co., supra,* remanded *Paschall* to the Supreme Court of Oklahoma to determine whether, under state law, the statute of limitations independently barred the former owner's attack on the tax title. If that should prove to be the case, this Court observed, any decision by this Court would be advisory and beyond its jurisdiction, citing *Murdock v. City of Memphis,* 20 Wall. 590 (1875). On remand, the Oklahoma Supreme Court held that there existed an adequate state ground (a statute of limitations) to support its earlier

decision. *Christie-Stewart, Inc. v. Paschall,* 45 J. Okla B. Ass'n. 2523 (1974).

What, then is the decisive meaning of *Paschall* on the present appeal? In *Pearson,* now before the Court, the former real estate owner (Pearson) brought a suit to quiet title as against the purchaser (Dodd) at a tax sale. The trial court upheld the West Virginia statutes in all respects, including the issue of due process. Upon appeal from the trial court, the Supreme Court of Appeals of West Virginia upheld the lower court on the issue of due process and, further, held that the attack by Pearson on the tax sale was barred by the absence of a statutory entitlement pursuant to the provisions of Code §11A-3-8. This is conceded by Pearson in her Brief on the Merits (p. 14-15).

Following the rationale of the *Paschall* case, Columbia submits that there is no need for remand to the Supreme Court of Appeals of West Virginia: under the law of the State of West Virginia, it has already been determined that the absence of a statutory entitlement under Code §11A-3-8 independently bars Pearson's claim. *McClure v. Maitland,* 24 W. Va. 561 (1884). As this Court observed in *Paschall,* any decision by this Court would be advisory only and beyond its jurisdiction. *Murdock v. City of Memphis, supra.*

For more than 100 years, the applicable rule of law has been, and remains, as stated in *Murdock:*

> "5. If it [this Court] finds that it [the constitutional question] was rightly decided, the judgment must be affirmed."
>
> "6. If it [the constitutional issue] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into

> the soundness of the decision on such other matter or issue." (22 L.Ed. 429, 444).

Based on previous decisions of local law in West Virginia, the Supreme Court of Appeals of West Virginia held in its decision in the present *Pearson* case:

> "It is our belief, and we so hold, that [under *Code,* 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W. Va. Const.,* Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray,* 132 W. Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins,* 131 W. Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.,* 130 W. Va. 1, 43 S.E.2d 625 (1947)". (App. at 20A Jurisdictional Statement).

In Pearson's Brief on the Merits, the position is taken (p. 12-13) that Columbia did not raise the issue of the absence of a statutory entitlement in *Pearson* under West Virginia Code §11A-3-8. Such assertion is not consistent with the Record in this case. The thrust of §11A-3-8 is that after any sale to the State for delinquent taxes, the former owner may redeem within 18 months; thereafter, such real estate is irredeemable and subject to transfer or sale by the State under the provisions of Sections 3 and 4, Article XIII of the Constitution of the State.

As early as December 2, 1968 in its initial pleading, Columbia, in addition to denying Pearson's title, in its Second Defense at paragraph 4 thereof, affirmatively took a position as follows:

> "4. Defendant admits that the Deputy Commissioner sold the subject land; admits that such sale included all interest of H. C. Pearson, Jr., and the interest claimed by plaintiff and that such sale included all

the title to the subject land and interests therein acquired by the State of West Virginia through the sale to it in the year 1962 for nonpayment of property taxes thereon for the year 1961. This defendant avers that such sale, and the deed executed pursuant thereto, included all right, title and interest of the State of West Virginia, however acquired, in the subject land." (App. 13).

Such specific defense is, in effect, the thrust of Code §11A-3-8 merely restated.

In support of Pearson's argument that West Virginia Code §11A-3-8 violates due process, this Court is referred by Pearson to decisions by the high Court in sister states, such as Michigan, Minnesota, Mississippi and Kansas (Brief on the Merits, p. 10-12).

To attempt to compare the situations involved in those states with the situation involved in West Virginia with Pearson is to compare "apples" with "oranges". If state law is probative or determinative on the issue, the Supreme Court of Appeals of West Virginia has determined that the procedure for tax deeds in West Virginia, formulated by its Constitution and Legislature, independently vests all title in the State, renders the same irredeemable and does not violate due process (App. A Jurisdictional Statement).

In *Pearson,* we have a situation where, for the year 1961, taxes were assessed, unpaid and delinquent. In 1962, Pearson's title was sold to the State of West Virginia where the title remained until 1966 when that title was sold by the State of West Virginia to Dodd. At that time, Pearson had no significant property interest for she had no title or interest after the year 1962 when her former interest became irredeemable. With a lease from Dodd, Columbia entered on the property and on March 26, 1968, at an initial cost of $104,500.87, completed a natural gas well with an initial open flow of 100,000,000 cubic feet of gas (App. 117-120). Only thereafter, on July 26, 1968, did Pearson pay the State Auditor $101.86 and receive what

was designated a Certificate of Redemption of Land in Pearson's name for the property in question (App. 121). It was even later in 1968 before Pearson commenced in the trial Court the litigation now the subject of this appeal. By then, Pearson's title had been sold to the State of West Virginia and by it, in turn, to Dodd.

Irrespective of whether the issue of due process was correctly decided (Columbia's position is that it was correctly decided), Columbia submits that the judgment of the Supreme Court of Appeals of West Virginia is sufficiently broad in its ruling that Code §11A-3-8 independently bars Pearson's claim and that the judgment should be affirmed without further inquiry into the due process issue.

III. INDEPENDENT OF THE OTHER QUESTIONS, DUE PROCESS OBJECTIONS DO NOT JUSTIFY THE RETROACTIVE INVALIDATION OF INNUMERABLE LONG ESTABLISHED LAND TITLES.

Certain legal principles applicable in *Pearson* are not unlike those prior situations before this Court where municipal bond issues were attacked on constitutional grounds as violative of the Fourteenth Amendment. *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970), is such a case wherein a restriction in Arizona, limiting the vote in elections to approve the issue of general obligation bonds, without question violated the Fourteenth Amendment.

Nevertheless, this Court was careful to adopt a rule which avoided any unjustifiably disruptive effect of retroactivity. Touching on the question of any statute of limitations, this Court said:

> "In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law." (399 U.S. 204, 214).

In *Cipriano v. Houma,* 395 U.S. 701 (1969), this Court recognized the significant hardships possibly imposed if decisions finding unconstitutionality based on the Fourteenth Amendment were given full retroactive effect. In confining any decision to prospective application, this Court said:

> "That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization." (395 U.S. 701, 706).

In *Pearson,* the authorization by Court orders to issue the tax-deed to Dodd has been legally complete since June 1, 1966 when the deed was made and delivered, pursuant to existing procedures under state law. On the basis of those existing state procedures and the tax-deed dated June 1, 1966, Columbia secured an oil and gas lease from Dodd and drilled a valuable gas well on the tax-deed title at an initial investment of $104,500.87. On March 26, 1968, Columbia completed such well as a natural gas well with an initial open flow of 100,000,000 cubic feet of gas. Surely a tax-deed acted on in good faith by a sizeable investment on the basis of existing law of presumed constitutionality can be equated with a municipal bond and honored as an existing security and asset, within the intent of *Cipriano* as endorsed by *Phoenix.*

The Record is replete with indications of the ramifications of this litigation in the State of West Virginia. In the Order of Publication (App. 77-80) wherein the interest of Pearson was proceeded against, 24 additional tracts, lots or interests were proceeded against by publication.

In West Virginia, there are fifty-five Counties. Each County has a Deputy Commissioner of Forfeited and Delinquent Lands. Each Deputy Commissioner is authorized to bring an action, in the name of the State of West Virginia, to sell forfeited or delinquent lands in that County, including 25 tracts, lots or interests in each such suit. The exact procedure under attack has been extant in the State of West Virginia since 1947. A mathematical extrapolation of those factors will produce a resultant figure of affected titles in the State of West Virginia almost too horrendous to contemplate. Considering the State's need for revenue, the necessity and desirability of the stability of land titles toward keeping those titles in the commerce of the State, any determination of violation of the Fourteenth Amendment calls for a decision only prospective in application.

CONCLUSION

Counsel for Columbia respectfully submit that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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September 3, 1976

AFFIDAVIT OF SERVICE OF APPELLEE'S BRIEF ON THE MERITS

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I, WM. ROY RICE, attorney for Columbia Gas Transmission Corporation, Appellee herein, depose and say that on the 3rd day of September, 1976, I served three copies of the foregoing Appellee's Brief on the Merits to the Supreme Court of the United States upon Cecle G. Pearson, Appellant herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at 1009 Security Building, Charleston, West Virginia 25301; and, further that I served three copies of the foregoing Appellee's Brief on the Merits to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301.

/s/ Wm. Roy Rice

Subscribed and sworn to before me by Wm. Roy Rice, at Charleston, West Virginia, this 3rd day of September, 1976.

My commission expires April 4, 1985.

/s/ Mary Marie Clendenin
Notary Public in and for
The State of West Virginia